himself thought he might chance his luck in coming to this court on appeal are really matters of no great consequences. But perhaps I should take the opportunity of correcting an unfortunate misconception that seemed to prevail in certain quarters that the colour of an accused's skin had anything to do with the question of sentence. I am compelled to say that if proper regard was given to the terms of the judgment which I delivered no foundation would be discovered for such a misconception. But the point was that at the appeal the accused advanced grounds which were deliberately false. He pleaded he had employment with an oil drilling company somewhere in Arabia and that his wife though suffering from a very serious illness and his child would be coming to Malaysia to set up home while he went to work in Arabia. It was his submission that during the periods of off-duty leave in Arabia, he would fly back to Malaysia to rejoin his family. Having some knowledge of the immigration laws of this country I find that submission very difficult to believe. But nevertheless I gave him an opportunity to establish that that was the case. He is even today unable to produce any evidence to substantiate his allegations. On the other hand, the Deputy Public Prosecutor took the hint and discovered from the Immigration Department that he had not made any application for permanent residence in this country either for himself or for his wife. I hope it will be realised if it has not been realised before that a very dim view is taken of anyone who comes to the court with the expressed intention of misleading it. Be that as it may, in answer to my invitation as I am bound by law to do, to address me, why in revision I should not increase the sentence, he chose to tell me that he had no intentions of cheating, that he had in fact carried the goods which are of a considerable bulk across the waters from Penang to Butterworth after vacating the house in which he was residing and that at the customs clearance point which he had to pass in order to decamp from Penang he had, he wanted me to believe, the intention of phoning the shopkeeper to return him the goods. I am very sorry, that I cannot accept that submission since he had admitted the element of cheating in the facts given against him. I shall, for the purposes of sentence, myself treat the accused as a first offender but even as a first offender I can for myself find no mitigating factor in all the circumstances and facts of the case. I must deplore any idea that a stranger can come to our shores and break our laws with impunity and hope to get away with his crimes in the expectation that he would be deported. The accused will be deported, in due course but only after he has served a proper sentence. The accused will now go to jail for 18 months.

Order accordingly.

CHEAH CHOON GAN & ORS. v. REGISTRAR OF TITLES, KEDAH

[F.C. (Azmi L.P., Gill and Ali F.JJ.) August 3, 1972]

[Alor Star — Federal Court Civil Appeal No. 95 of 1971]

Stamps — Partition of land — Subdivision — Exchange — National Land Code, s. 418 — National Land Code (Penang & Malacca Titles) Act, 1963 — Stamp Ordinance, 1949, 1st Sch. items 43, 32 & 56.

In this case the seven appellants were the co-proprietors of a piece of land. They entered into a partition agreement and effected cross-transfers of the land by means of three memoranda of transfer on sub-division of the land being granted. The solicitors for the appellants requested the collector to value separately the land described in the three memoranda of transfer and the collector valued the property at $62,000, $70,200 and $55,600 respectively. After receiving the valuation the solicitors proceeded to have the memorandum effecting the property valued at $70,200 stamped with *ad valorem* duty and the other two memoranda with 50 cents stamps. They then presented the stamped memoranda for registration. The collector accepted the memorandum of transfer stamped with the *ad valorem* duty but rejected the other two on the ground that they were not properly stamped. The appellants then appealed to the High Court, which dismissed the appeal. On appeal to the Federal Court, it was argued that this was a case of partition or exchange and in either case it would come within the scope of section 4(3) of the Stamp Ordinance read with Items 32 and 43 of the First Schedule thereto.

Held, allowing the appeal: this was a case of exchange attracting Item 43 of the First Schedule to the Stamp Ordinance and since *ad valorem* duty had been paid on the memorandum of greater value, the other two instruments stamped with the 50 cents stamp were properly stamped.

FEDERAL COURT.

Neoh Guan Beng for the appellant.

Tunku Mokhtar bin Tunku Yaacob (Legal Adviser, Kedah) for the respondent.

Azmi L.P.: This is an appeal from a judgment of the High Court at Alor Star in exercise of its appellate jurisdiction under section 418 of the National Land Code.

The facts which are not disputed may be briefly stated as follows: —

The seven appellants purchased a piece of land from Henrietta Rubber Estate Ltd. and thus became the co-proprietors of the said land in the following three groups of shares, namely, the first group consisting of the first appellant Cheah Choon Gan holding 95/235 shares, the second group consisting of the second and third appellants Thian Now (f) and Cheah Swee Ean holding 80/235 shares and the third group consisting of the 4th, 5th, 6th and 7th appellants, Chew Cheng Cheong, Yow Tuan Beng, Tan Seng and Ooi Eaw Tee (f) holding 60/235 shares. Subsequently, by a partition agreement dated 5th July 1967, made among themselves, they agreed that the land be sub-divided into seven lots. A sub-division of the land was effected with the result that the said land became Lots Nos: 2762, 2763, 2757, 2758, 2759, 2760 and 2761, and for these lots were issued Grants Nos: 1637, 1638, 1632, 1633, 1634, 1635 and 1636 respectively.

The sub-division was apparently made under Part 9, Chapter I entitled "Sub-division of Lands" of the National Land Code and in consequence thereof the names of all the proprietors with their original shares are entered on each of the seven titles.

The appellants in pursuance to the terms of their partition agreement applied for cross transfers of these lands by means of three memoranda of transfer in the following manner.

(i) Memorandum of transfer dated 24th August 1970 between Cheah Choon Gan, Thian Now (f) and Cheah Swee Ean as transferors and Chew Cheng Cheong alias Chow Koon Cheong, Yow Tuan Beng, Tan Seng and Ooi Eaw Tee (f) as transferees transferring 175/235 (95/235 and 80/235) undivided share of Lot No. 2763 Mukim of Tawar comprised in Grant No. 1638 of the transferees.

(ii) Memorandum of transfer dated 24th August 1970 between Cheah Choon Gan, Chew Cheng Cheong alias Chow Koon Cheong, Yow Tuan Beng, Tan Seng and Ooi Eaw Tee (f) as transferors and Thian Now (f) and Cheah Swee Ean as transferees transferring 155/235 (95/235 plus 60/235) undivided share of lot No. 2762 Mukim of Tawar comprised in Grant No. 1637 to the transferees.

(iii) Memorandum of transfer dated 24th August 1970 between Thian Now (f), Cheah Swee Ean, Chew Cheng Cheong alias Chow Koon Cheong, Yow Tuan Ben, Tan Seng and Ooi Eaw Tee (f) as transferors and Cheah Choon Gan as transferee transferring 140/235 (80/235 plus 60/235) undivided share of lots Nos. 2757, 2758, 2759, 2760 and 2761 Mukim of Tawar comprised in Grants Nos. 1632, 1633, 1634, 1635 and 1636 to the transferee.

The registration of the above memoranda of transfer would, if carried out give the following result: —

(i) The first appellant will become the proprietor of Lots 2757, 2758, 2759, 2760 and 2761 held respectively under grants numbers, 1632, 1633, 1634, 1635 and 1636.

(ii) The second and third appellants will become the proprietors in equal shares of Lot No. 2762 held under Grant No. 1637 and

(iii) The appellants No. 4 to No. 7 will become the proprietors in equal shares of Lot 2763 held under grant No. 1638.

It is necessary to pause here and to refer to the various relevant provisions of the Stamp Ordinance. Section 4(3) of the said Ordinance reads as follows: —

"Where in the case of any sale, lease, charge, settlement, exchange or partition several instruments are employed for completing the transaction, the principal instrument only shall be chargeable with the duty prescribed, in the First Schedule to this Ordinance, for the conveyance, lease, charge, settlement or partition and each of the other instruments shall be chargeable with a duty of half a dollar only; and the parties may determine for themselves which of the instruments so employed shall, for the purpose of this sub-section, be deemed to be the principal instrument."

Items 43, 32 and 56 of the First Schedule of the Ordinance appear to be the relevant items for consideration in this matter. They read as follows: —

43. Exchange. Any instrument whereby an exchange of any property is effected.	The same duty as a conveyance on sale for a consideration equal to the value of the property of greater value.
32. Conveyance, Assignment, Transfer or Absolute Bill of Sale:	
(a) On sale of any property (except stock, shares and marketable securities);	$1.00 for every $100 or fractional part of $100 of the money value of the consideration or the market value of the property whichever is the greater.
56. Partition; For each instrument.	$10/- "
(Exemption: (This does not apply)	

It would be apparent from the second column of item 32 that in the case of conveyance or transfer the 1% stamp duty would be payable on the property, if more than one, of the greater value, and that in such a case the choice given to the parties under section 4(3) of the Stamp Ordinance to determine for themselves which of the instruments so employed shall be the principal instrument, is not available to them.

No doubt having the above provisions in mind; the solicitors for the appellants requested the collector to value separately the land now described in the three memoranda of transfer. In response thereto the collector valued the property in the three memoranda of transfer at $62,000, $70,200 and $55,600 respectively. After receiving the valuation, they then proceeded to have the memorandum effecting the property valued at $70,200 stamped with the *ad valorem* duty and the other two memoranda with 50 cent stamps each in accordance with item 32 of the Schedule to the Stamp Ordinance.

They then presented the stamped memoranda of transfer to the collector for registration. The collector accepted the memorandum of transfer stamped with the *ad valorem* duty but rejected the other two on the ground that they were not properly stamped. The matter was referred to the Legal Adviser Kedah, and he agreed with the view taken by the collector.

The appellants then appealed to the High Court under section 418 of the National Land Code against the decision of the Collector as Registrar of Titles, Kedah, for rejecting the two memoranda of transfer stamped with the 50 cent stamps. The learned judge in his grounds of judgment first stated that the main question in this case was whether the two rejected transfers together with the registered transfer are instruments employed to effect an exchange or partition of land. But after referring to the provisions of section 4(3) of the Stamp Ordinance and Item 43 of the First Schedule to the Ordinance, he decided the question on the basis that this was not in actual fact a case of partition or exchange but rather a case of sub-division of the said land under the National Land Code. In the result he concluded that each of the memorandum of transfer should attract *ad valorem* duty.

The dissatisfied appellants appealed again to this court.

Before us counsel for the appellants argued that this was either a case of partition or exchange and in either case it would come within the scope of section 4(3) of the Stamp Ordinance read with items 32 and 43 of the First Schedule thereto. In support of the

first argument, counsel referred us to the present land dealings in Penang and in particular to section 11 of the National Land Code (Penang and Malacca) Order 1965 which expressly provide that Chapters 2, 3 and 4 of Part 9 of the National Land Code 1965 shall not apply in relation to land held under interim title. Chapter 2 deals with partition of lands. He goes on to point out that all lands in Penang are held under interim titles until they have become indefeasible pursuant to sections 84, 85, 87 and 89 of the National Land Code (Penang and Malacca Titles) Act 1963. Because of the said section 11 a partition to be effected in Penang has to be by way of sub-division and thereafter by way of cross-transfers, and in a cross transfer of such a nature section 4(3) of the Stamp Ordinance would apply. It was therefore argued that a partition may be effected in a manner other than as provided in Chapter 2, Part 9 of the National Land Code, and the provisions of section 4(3) of the Stamp Ordinance covers such a partition. The cross-transfers in question involving three instruments of transfers presented to the collector amount to a partition within the meaning of section 4(3) of the Stamp Ordinance. Therefore, submitted counsel, for the above reasons the memoranda of transfers were wrongly rejected by the respondent.

The other argument put forward by counsel for the appellants was that this was a case of exchange attracting stamp duty under item 43 of the First Schedule to the Stamp Ordinance. He explained it in the following manner. An exchange at common law means an assurance by which one person conveys property to another in consideration of a conveyance of property by mutual conveyance or transfer. The seven lots in question came from the original lot 87 which was registered in the names of the appellants. The land was the same and no new property was involved and there was no monetary consideration. The three instruments of transfer presented by the appellants were merely to enable themselves in their three respective groups to become co-owners of their respective lots to the exclusion of others. The learned judge below himself had accepted that this was the intention of the parties. He had therefore erred in not holding that the three instruments so presented come within the meaning of "exchange" under section 4(3) of the Stamp Ordinance 1949.

Learned counsel for the respondent argued on the other hand, that the appellants in pursuance of the partition agreement made among themselves applied for sub-division. They could have applied for a partition and if they had done so then there would be no question of stamp duty arising, because the land would have been surveyed and each party would have had a demarcated area proportionate to his or their share. In the circumstances no question of cross-transfers would have arisen. He went on to say that under the National Land Code partition is treated separately from sub-division and therefore is distinguishable. If, however, they had proceeded under the provisions dealing with partition under the Land Code the land would not have been sub-divided in the way they had done and agreed to do under the partition agreement. In a partition they had to comply with the provisions in paragraph (b) of section 141(1) which requires that in a partition the area to be vested in each co-proprietor has to be as near as may be proportionate to his undivided share in the whole.

In my view it is essential to keep in mind that we are concerned only with the question of what stamp duty is payable in this transaction.

The words "instrument of partition" are defined in the Stamp Ordinance and read as follows: —

" 'Instrument of partition' means any instrument whereby co-owners of any property divide or agree to divide such property in severalty and includes also a final order for effecting a partition passed by the High Court or made by the Collector of Land Revenue and an award by an arbitrator directing a partition."

If I understand counsel for the respondent correctly, whatever may be the definition given in the Stamp Ordinance to the word "partition", it must be interpreted in the light of the provisions of the National Land Code pertaining to it. In other words, for the purpose of this case a "partition" acceptable to the Collector of Land Revenue must be partition with all the restrictions given to it in the Code. That would mean that notwithstanding the wide meaning that could be put to the word "partition" in the Stamp Ordinance it must be interpreted subject to the provisions of the Land Code. For the purpose of this appeal it is not necessary for me to decide that question. I would, however, accept the alternative argument of the counsel for the appellants that this is a case of an exchange attracting item 43 of the First Schedule of the Stamp Ordinance and since *ad valorem* duty has been paid on the memorandum of the greater value, the other two instruments stamped with the 50 cent stamp each are therefore properly stamped.

I would therefore allow the appeal.

Gill and **Ali F.JJ.** concurred.

Appeal allowed.

Solicitors: *Presgraves & Matthews.*

LEBAI TAIB v. ABDUL GHANI & ANOR.

[F.C. (Azmi L.P., Gill and Ali F.JJ.) August 3, 1972]

[Alor Star — Federal Court Civil Appeal No. 9 of 1972]

Land — Transfer of land — Jual Janji — Whether oral agreement to retransfer land admissible — Evidence Act, sections 91 and 92.

The plaintiff in this case, the administrator of the estate of his mother, Haji Munah, brought an action for specific performance of a verbal agreement to retransfer certain lands. It was alleged that the lands were transferred by the deceased to the defendant and that at the time of transfer the defendant agreed that he would resell the lands to the deceased for the same consideration. The learned trial judge dismissed the action on the ground *inter alia* that the alleged oral agreement was inadmissible as it contravened sections 91 and 92 of the Evidence Ordinance.

Held, allowing the appeal: (1) the oral agreement in this case was admissible as it could not be held to have contradicted, varied or subtracted to or added to the terms of the registered transfers;